UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 514—August Term, 1993

(Argued: October 28, 1993 Decided: January 31, 1994)

Docket No. 93-7561

In the matter of the complaint of MARINE RECREATIONAL OPPORTUNITIES, INC., as owner of a 1987 Cruisers, Inc. 286 Rogue Sport for exoneration from or limitation of liability,

Plaintiff-Appellant,

—v.—

ZACHARY BERMAN and BENNETT MARINE, INC.,

Defendants,

GERALD BERMAN and JOSEPHINA BERMAN,

Defendants-Appellees.

Before:

LUMBARD, VAN GRAAFEILAND and WINTER,
Circuit Judges.

Appeal from a decision of the United States District Court for the Southern District of New York (John F. Keenan, *Judge*) dismissing a limitation or exoneration action for lack of subject matter jurisdiction on the grounds that plaintiff was not the owner of the vessel at the time of the accident.

Affirmed.

JOSEPH J. PERRONE, New York, New York (Peter D. Fenzel, New York, New York, of counsel), *for Plaintiff-Appellant.*

RICHARD D. TUNICK, New York, New York, *for Defendants-Appellees.*

WINTER, *Circuit Judge*:

Marine Recreational Opportunities, Inc. ("MRO") appeals from Judge Keenan's order dismissing its complaint for lack of subject matter jurisdiction. MRO commenced this action under 46 U.S.C. § 183 (1988), seeking exoneration from, or limitation of, its liability for injuries to Gerald Berman. Berman's injuries were suffered aboard a vessel previously sold by MRO. We conclude that MRO was not an "owner" of the vessel within the meaning of Section 183. We therefore affirm the district court's dismissal.

In 1991, MRO purchased a pleasure craft, a 1987 Cruisers, Inc. 286 Rogue Sport ("p/c Rogue Sport") at a public auction. On May 31, 1991, MRO sold the vessel to Zachary Berman, Gerald Berman's son, for $41,000, and

title and possession of the vessel transferred from MRO to Zachary Berman on that date. On June 2, 1991, Zachary Berman, accompanied by Gerald and Josephina Berman, took the p/c Rogue Sport out on Long Island Sound. When the boat hit a large wave or wake, Gerald Berman was allegedly thrown around the boat and seriously injured.

Gerald and Josephina Berman filed suit against MRO in New York State Supreme Court, Bronx County, to recover damages for Gerald's injuries. In their complaint, the Bermans alleged, *inter alia*, that MRO sold Zachary Berman a vessel with defective trim tabs, was negligent in failing to inspect the trim tabs before delivery, was negligent in failing to warn the purchaser of "a known dangerous, defective and hazardous condition," and was negligent in failing to train him in the proper operation of the vessel.

MRO then brought the instant action pursuant to Fed. R. Civ. P. Supp. F. seeking exoneration from, or limitation of, its liability for the alleged injuries. Pursuant to the Bermans' motion, the district court dismissed the action for lack of subject matter jurisdiction. This appeal followed.

Section 183(a) provides in pertinent part:

> The liability of the owner of any vessel, whether American or foreign, . . . for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

We conclude that this statute does not apply to MRO because it was not the owner of the p/c Rogue Sport at the time of the accident, and it is not being sued in that capacity.

Section 183 was enacted in 1851 "to encourage investments in ships and their employment in commerce," so that "the shipping interests of this country might not suffer in competition with foreign vessels." *American Car & Foundry Co. v. Brassert*, 289 U.S. 261, 263 (1933). To effectuate this purpose, the term "owner" as used in the statute has been interpreted in a "liberal way." *Dick v. United States*, 671 F.2d 724, 727 (2d Cir. 1982) (*quoting Flink v. Paladini*, 279 U.S. 59, 63 (1929)). In *Dick v. United States*, we stated that "[a]s a general rule, one who is subjected to a shipowner's liability because of his exercise of dominion over a vessel should be able to limit his liability to that of an owner." 671 F.2d at 727. MRO argues that under this liberal interpretation of the term "owner," it is entitled to limit its liability, because the Bermans seek to hold it liable for alleged negligence that occurred when the vessel was under its dominion and control.

However, in most of the cases that purport to apply a broad interpretation of "owner," the party seeking to limit liability had actual title or was capable of exercising some measure of dominion or control over the vessel at the time of the accident. *See id.* at 726-28; *In re Exoneration from or Limitation of Liability of Shell Oil Co.*, 780 F. Supp. 1086, 1087, 1089-90 (E.D. La. 1991) (parent corporation that conveyed vessel to subsidiary but retained record title is "owner" because "the act is designed to cover one who is a 'likely target' for liability claims predicated on his status as the person perhaps ultimately responsible for the vessel's maintenance and operation"); *In re Barracuda*

Tanker Corp., 281 F. Supp. 228, 231 (S.D.N.Y. 1968) (plaintiff considered "owner" where it sold and leased back vessel prior to accident), *remanded on other grounds*, 409 F.2d 1013 (2d Cir. 1969).

MRO cites only one case that allowed limitation of liability by a prior owner who lacked any measure of control over the vessel at the time of the accident giving rise to liability. *In re The Trojan*, 167 F. Supp. 576, 578 (N.D. Cal. 1958), *aff'd sub nom Todd Shipyards Corp. v. United States*, 274 F.2d 402 (9th Cir. 1960). We decline to follow *The Trojan*. Other courts have uniformly held that the time of the accident determines "ownership" under Section 183. Indeed, after *The Trojan*, the Ninth Circuit itself held that a plaintiff who acted as an agent in the sale of a fishing boat was not an owner within the meaning of the statute. *See Calkins v. Graham*, 667 F.2d 1292 (9th Cir. 1982). In reaching its conclusion, the court stated, "When the accident occurred, Calkins no longer had possession or control of the vessel, nor was he responsible for its maintenance and operation. . . ." *Id.* at 1294; *see also Complaint of Sheen*, 709 F. Supp. 1123, 1128 (S.D. Fla. 1989) (". . . [T]he appropriate time of ownership for [Section 183] purposes must be the period encompassing the maritime accident"). One does not have to become a plain-meaning-of-the-statutory-language fanatic to conclude that a complete absence of legal title and of any practical control over a vessel at the time of the relevant accident precludes resort to Section 183. The use of the term "owner" in Section 183 is in the singular and does not suggest other persons in this chain of title. Extension of Section 183 to others in the chain of title is a rather extraordinary step, and any intent to afford prior owners the benefits of limitation or exoneration certainly would have found expression in the statutory language. More-

over, a contrary ruling would create a conflict among the circuits without our having any compelling reason to depart from the precedents of other circuits. *International Soc'y for Krishna Consciousness, Inc. v. Lee*, 925 F.2d 576, 580 (2d Cir. 1991), *aff'd in part*, 112 S. Ct. 2701 (1992); *Feeney v. Port Authority Trans-Hudson Corp.*, 873 F.2d 628, 631-32 (2d Cir. 1989), *aff'd*, 495 U.S. 299 (1990).

The district court therefore properly dismissed the complaint for lack of subject matter jurisdiction. We affirm.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

92 CIV. 6476 (JFK)

In The Matter of the Complaint of Marine Recreational Opportunities, Inc., as owner of a 1987 Cruisers, Inc. 286 Rogue Sport for exoneration from or limitation of liability.

OPINION AND ORDER

APPEARANCES: For Plaintiff Marine Recreational:
McDonald, Herbermann & Fenzel
New York, New York
Of Counsel:
Joseph J. Perrone, Esq.
Joseph B. McDonald, Esq.

For Claimants Gerald and Josefina Berman:
Richard D. Tunick, Esq.
New York, New York

JOHN F. KEENAN, United States District Judge:

Before the Court is a motion by Claimants Gerald Berman and Josefina Berman ("Claimants") to dismiss Plaintiff's complaint for lack of subject matter jurisdiction and failure to state a claim. Fed. R. Civ. P. 12(b)(1), (6). For the reasons that follow, their motion is granted.

BACKGROUND

On May 31, 1991, Plaintiff Marine Recreational Opportunities, Inc. ("MRO") sold a pleasure craft, a 1987 Cruisers, Inc. 286 Rogue Sport, to a man named Zachery Berman for $41,000.00. MRO had purchased the vessel on the open market sometime in 1991, and was not the manufacturer, wholesaler, resaler or distributor of the vessel to the general public.

On June 2, 1991, Mr. Berman took his new boat out on Long Island Sound, accompanied by two guests: Gerald and Josefina Berman, the Claimants. When the boat hit a large wave or wake, Claimant Gerald Berman was allegedly thrown around in the interior of the boat and injured.

On February 21, 1992, approximately eight months after the accident, MRO repurchased the vessel from Zachery Berman.

Mr. Gerald Berman and his wife have filed a tort action in Bronx County State Supreme Court against both MRO and Zachery Berman to recover for Mr. Gerald Berman's injuries and Mrs. Berman's derivative losses. MRO thereafter filed this action under Supplemental Rule F of the Federal Rules of Civil Procedure seeking exoneration from or limitation of its liability for its conduct during its sale of the vessel to Mr. Berman.

DISCUSSION

46 U.S.C. section 183(a) provides that

> [t]he liability of the owner of any vessel, whether American or foreign, for any . . . loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not . . . exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

This statute was enacted in 1851 "to encourage investments in ships and their employment in commerce." *American Car and Foundry Co. v. Brassert*, 289 U.S. 261 (1933). As the Supreme Court has explained, "[t]he statute embodied the principle of the general maritime law that shipowners should not 'be liable beyond their interest in the ship and freight for the acts of the master and the crew done without their privity or knowledge.'" *Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527, 549 (1889). The statute therefore limits "a liability imputed by law by reason of the ownership of the vessel," but does not limit any liability arising from the owner's own fault, neglect or contracts. *See Richardson v. Harmon*, 222 U.S. 96, 103, 106 (1911).

The first inquiry in determining whether the statute is applicable is whether the plaintiff was the owner of the vessel within the meaning of the statute. There is no dispute that MRO was the owner of the vessel until May 31, 1991, two days before the accident, and from the time of February 21, 1992, eight months after the accident. Plaintiff concedes that it did not own the vessel on the date of the accident, and that is the relevant date under the statute. *See Calkins v. Graham*, 667 F.2d 1292 (9th Cir. 1982) ("The circumstances which make one a 'likely target' [for legal claims resulting from a vessel accident] must exist at the time of the accident or loss."); *American Car & Foundry Co. v. Brassert*, 61 F.2d 162, 164 (7th Cir. 1932) (issue is whether the party seeking to limit liability was owner at time of accident), *aff'd*, 289 U.S. 261 (1933); *In Re Complaint of Sheen*, 709 F. Supp. 1123, 1128 & n.4 (S.D. Fla. 1989) ("appropriate time of ownership for Limitation Act purposes must be the period encompassing the maritime accident").

MRO can point to only a single case, *In Re Trojan*, 1959 A.M.C. 201 (N.D. Cal. 1958), for the proposition that a former owner can petition for limitation of liability based on the fact that his own negligent conduct occurred before the sale of the vessel. That case was never appealed to the Ninth Circuit; in fact, since that lower-court decision, the Ninth

Circuit has clearly held that the relevant period of ownership for limitation Act purposes is the time of the accident. *See Calkins v. Graham*, 667 F.2d 1292 (9th Cir. 1982). The Court declines, therefore, to follow down the lonely path of *In Re Trojan*.

Because MRO was not the owner of the vessel at the time of the accident, its relationship to the vessel cannot be the basis of potential liability. If there is any liability on MRO's part, it flows not from MRO's relationship to the vessel but from any negligent acts or omissions in selling the vessel to Mr. Berman in less-than-perfect condition or without giving appropriate warnings. That is not the sort of liability towards which the statute is directed.

Accordingly, the Court finds that it lacks subject-matter jurisdiction over this action. Claimants' motion to dismiss for failure to state a claim need not be considered.

This action is ordered removed from the Court's active docket.

SO ORDERED.

Dated: New York, New York
May 11, 1993

JOHN F. KEENAN
John F. Keenan
United States District Judge

46 U.S.C. § 183

§ 183. Amount of liability; loss of life or bodily injury; privity imputed to owner; "seagoing vessel"

(a) The liability of the owner of any vessel, whether American or foreign, for any embezzlement, loss, or destruction by any person of any property, goods, or merchandise shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

(b) In the case of any seagoing vessel, if the amount of the owner's liability as limited under subsection (a) of this section is insufficient to pay all losses in full, and the portion of such amount applicable to the payment of losses in respect of loss of life or bodily injury is less than $420 per ton of such vessel's tonnage, such portion shall be increased to an amount equal to $420 per ton, to be available only for the payment of losses in respect of loss of life or bodily injury. If such portion so increased is sufficient to pay such losses in full, they shall be paid therefrom in proportion to their respective amounts.

(c) For the purposes of this section the tonnage of a seagoing steam or motor vessel shall be her gross tonnage without deduction on account of engine room, and the tonnage of a seagoing sailing vessel shall be her registered tonnage: *Provided*, That there shall not be included in such tonnage any space occupied by seamen or apprentices and appropriated to their use.

(d) The owner of any such seagoing vessel shall be liable in respect of loss of life or bodily injury arising on distinct occasions to the same extent as if no other loss of life or bodily injury had arisen.

(e) In respect of loss of life or bodily injury the privity or knowledge of the master of a seagoing vessel or of the superintendent or managing agent of the owner thereof, at or prior to the commencement of each voyage, shall be deemed conclusively the privity or knowledge of the owner of such vessel.

(f) As used in subsections (b), (c), (d), and (e) of this section and in section 183b of this title, the term "seagoing vessel" shall not include pleasure yachts, tugs, towboats, towing vessels, tank vessels, fishing vessels or their tenders, self-propelled lighters, nondescript self-propelled vessels, canal boats, scows, car floats, barges, lighters, or nondescript non-self-propelled vessels, even though the same may be seagoing vessels within the meaning of such term as used in section 188 of this title. R.S. § 4283; Aug. 29, 1935, c. 804, § 1, 49 Stat. 960; June 5, 1936, c. 521, § 1, 49 Stat. 1479.

Federal Rule Civil Procedure Supp. F.

Rule F.Limitation of Liability

(1) Time for Filing Complaint; Security. Not later than six months after receipt of a claim in writing, any vessel owner may file a complaint in the appropriate district court, as provided in subdivision (9) of this rule, for limitation of liability pursuant to statute. The owner (a) shall deposit with the court, for the benefit of claimants, a sum equal to the amount or value of the owner's interest in the vessel and pending freight, or approved security therefor, and in addition such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended; or (b) at the owner's option shall transfer to a trustee to be appointed by the court, for the benefit of claimants, the owner's interest in the vessel and pending freight, together with such sums, or approved security therefor, as the court may from time to time fix as necessary to carry out the provisions of the statutes as amended. The plaintiff shall also give security for costs and, if the plaintiff elects to give security, for interest at the rate of 6 percent per annum from the date of the security.

(2) Complaint. The complaint shall set forth the facts on the basis of which the right to limit liability is asserted and all facts necessary to enable the court to determine the amount to which the owner's liability shall be limited. The complaint may demand exoneration from as well as limitation of liability. It shall state the voyage if any, on which the demands sought to be limited arose, with the date and place of its termination; the amount of all demands including all unsatisfied liens or claims of lien, in contract or in tort or otherwise, arising on that voyage, so far as known to the plaintiff, and what actions and proceedings, if any, are pending thereon; whether the vessel was damaged, lost, or abandoned, and, if so, when and where; the value of the vessel at the close of the voyage or, in case of wreck, the value of her wreckage, strippings, or

proceeds, if any, and where and in whose possession they are; and the amount of any pending freight recovered or recoverable. If the plaintiff elects to transfer the plaintiff's interest in the vessel to a trustee, the complaint must further show any prior paramount liens thereon, and what voyages or trips, if any, she has made since the voyage or trip on which the claims sought to be limited arose, and any existing liens arising upon any such subsequent voyage or trip, with the amounts and causes thereof, and the names and addresses of the lienors, so far as known; and whether the vessel sustained any injury upon or by reason of such subsequent voyage or trip.

(3) Claims Against Owner; Injunction. Upon compliance by the owner with the requirements of subdivision (1) of this rule all claims and proceedings against the owner or the owner's property with respect to the matter in question shall cease. On application of the plaintiff the court shall enjoin the further prosecution of any action or proceeding against the plaintiff or the plaintiff's property with respect to any claim subject to limitation in the action.

(4) Notice to Claimants. Upon the owner's compliance with subdivision (1) of this rule the court shall issue a notice to all persons asserting claims with respect to which the complaint seeks limitation, admonishing them to file their respective claims with the clerk of the court and to serve on the attorneys for the plaintiff a copy thereof on or before a date to be named in the notice. The date so fixed shall not be less than 30 days after issuance of the notice. For cause shown, the court may enlarge the time within which claims may be filed. The notice shall be published in such newspaper or newspapers as the court may direct once a week for four successive weeks prior to the date fixed for the filing of claims. The plaintiff not later than the day of second publication shall also mail a copy of the notice to every person known to have made any claim against the vessel or the plaintiff arising out of the voyage or trip on which the claims sought to be limited

arose. In cases involving death a copy of such notice shall be mailed to the decedent at the decedent's last known address, and also to any person who shall be known to have made any claim on account of such death.

(5) Claims and Answer. Claims shall be filed and served on or before the date specified in the notice provided for in subdivision (4) of this rule. Each claim shall specify the facts upon which the claimant relies in support of the claim, the items thereof, and the dates on which the same accrued. If a claimant desires to contest either the right to exoneration from or the right to limitation of liability the claimant shall file and serve an answer to the complaint unless the claim has included an answer.

(6) Information to be Given Claimants. Within 30 days after the date specified in the notice for filing claims, or within such time as the court thereafter may allow, the plaintiff shall mail to the attorney for each claimant (or if the claimant has no attorney to the claimant) a list setting forth (a) the name of each claimant, (b) the name and address of the claimant's attorney (if the claimant is known to have one), (c) the nature of the claim, i.e., whether property loss, property damage, death, personal injury etc., and (d) the amount thereof.

(7) Insufficiency of Fund or Security. Any claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight. Thereupon the court shall cause due appraisement to be made of the value of the plaintiff's interest in the vessel and pending freight; and if the court finds that the deposit or security is either insufficient or excessive it shall order its increase or reduction. In like manner any claimant may demand that the deposit or security be increased on the ground that it is insufficient to carry out the provisions of the statutes relating to claims in respect of loss of life or bodily injury; and, after notice and hearing, the

court may similarly order that the deposit or security be increased or reduced.

(8) Objections to Claims: Distribution of Fund. Any interested party may question or controvert any claim without filing an objection thereto. Upon determination of liability the fund deposited or secured, or the proceeds of the vessel and pending freight, shall be divided pro rata, subject to all relevant provisions of law, among the several claimants in proportion to the amounts of their respective claims, duly proved, saving, however, to all parties any priority to which they may be legally entitled.

(9) Venue; Transfer. The complaint shall be filed in any district in which the vessel has been attached or arrested to answer for any claim with respect to which the plaintiff seeks to limit liability; or, if the vessel has not been attached or arrested, then in any district in which the owner has been sued with respect to any such claim. When the vessel has not been attached or arrested to answer the matters aforesaid, and suit has not been commenced against the owner, the proceedings may be had in the district in which the vessel may be, but if the vessel is not within any district and no suit has been commenced in any district, then the complaint may be filed in any district. For the convenience of parties and witnesses, in the interest of justice, the court may transfer the action to any district; if venue is wrongly laid the court shall dismiss or, if it be in the interest of justice, transfer the action to any district in which it could have been brought. If the vessel shall have been sold, the proceeds shall represent the vessel for the purposes of these rules.